Office - Supreme Court, U. S.
FILED
APR 11 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 701

CHARLES GORDON,

Petitioner,

vs.

WILLIAM E. BERGIN, INDIVIDUALLY AND AS ADJUTANT GENERAL OF THE ARMY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
CLARA L. LONGSTRETH,
Counsel for Petitioner.

INDEX

	Page
Petition	1
Jurisdictional Statement	1
Summary Statement of the Matter Involved	2
Basis of Decision Below Holding Case Moot	6
Question Presented	6
Reasons for Allowance of the Writ	7

Cases Cited

Reaves v. *Ainsworth*, 219 U. S. 296, 304	7
U. S. v. *Eliason*, 16 Peters 291	7
Gratiot v. *United States*, 4 Howard 80	7
Wales v. *Whitney*, 114 U. S. 564, 571	7
Humphrey v. *Smith*, 336 U. S. 695	8
Miguel v. *McCarl*, 291 U. S. 442	8
Altvater v. *Freeman*, 319 U. S. 359, 364	8
U. S. v. *Alaska S. S. Company*, 253 U. S. 113, 116	8

Army Regulations Cited

A. R. 600-355 (6) (b)	2
A. R. 380-5	5

Statutes Cited

Article of War 70, 41 Stat. 759, 802, as amended 10 U. S. C. 1542	8
Military Justice Act of 1948, 62 Stat. 639	10
Military Justice Act of 1950, 64 Stat. 107	10
Public Law 220, 82d Cong., Approved October 25, 1951	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 701

CHARLES GORDON,

Petitioner,

vs.

WILLIAM E. BERGIN, INDIVIDUALLY AND AS ADJUTANT GENERAL OF THE ARMY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Charles Gordon, prays for the issuance of a Writ of Certiorari to review the judgment below, dismissing his appeal as moot.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1). The judgment below was entered November 15, 1951 (R. 34). This Court granted an extension of time on February 12, 1952, extending the time to file a petition for

certiorari until March 12, 1952 (R. 34). On March 10, 1952, this Court granted a further extension of time up to and including April 11, 1952 (R. 35).

Summary Statement of Matter Involved

Review is asked of the action of the Court below in dismissing Petitioner's appeal as moot under the following circumstances:

Petitioner filed a Complaint, in the District Court below, in the nature of an action in *mandamus*. He asked the District Court to compel the Adjutant General of the Army to deliver to him all papers concerning his arrest and confinement, trial having been deemed inadvisable (R. 5A).

A.R. 600-355, par. 6(b), July 17, 1942, giving an accused officer the right to such papers, provides:

> "Whenever a commanding officer places an officer in arrest or confinement without preferring charges, he will make a written report of his action to the officer having general court-martial jurisdiction, who will call on the officer arrested or confined for any explanation he may desire to make, and take such further action within his authority as he may think necessary. When trial is deemed inadvisable, the officer having general court-martial jurisdiction will forward all papers in the case to the Adjutant General, through military channels, with a statement of action taken and reasons therefor. *A copy of all papers will, at the same time, be sent to the officer arrested or confined,* who may address to the Adjutant General direct any further statements or explanation he may desire to make. When no further action is contemplated by the War Department, the papers in the case, or copies thereof, will be filed with the officer's record, and the officer so advised through military channels."

In violation of the above, the Adjutant General refused to deliver the above papers to Petitioner, who was arrested without charges being preferred; confined for ninety-eight

days; dismissed without honor, although he demanded trial; and, all this time, kept in the dark as to the nature of the charges against him (R. 6A).

Petitioner's arrest occurred on April 18, 1947, at the Pentagon, upon his return from a top-secret mission to Korea, where he was at first Director of Finance and later advisor to the Korean Director of Finance (R. 3A).

He was kept under arrest and confinement from April 18 until July 25, 1947. During this period, no charges of any kind were preferred against him; no court-martial was instituted, although demanded by the petitioner; and he was continued in arrest and confinement throughout this period, without explanation.

On July 25, 1947, Petitioner was ordered, on less than two hours' notice, to report to a designated officer at Fort Myer, Virginia, for discharge (R. 3A). During this two-hour period, he demanded trial by court-martial or the convening of a Board of Inquiry (R. 3A-4A). No attention was paid to his demands; instead, he was forthwith, over his protest, dismissed from the Army under conditions other than honorable, and his AUS commission was vacated. On August 13, 1947, his Reserve Commission was rescinded.

No official explanation for any of the above was ever given him (R. 5A-6A). On September 26, 1947, he learned from his Representative in Congress that various investigations of his conduct in Korea had been made, upon completion of which full reports thereof had been sent to the Commanding General. The latter decided against trial by court-martial, but chose instead to separate Petitioner from the service in the summary way described (R. 4A).

On June 5, 1947, the Commanding General, pursuant to A.R. 600-355, par. 6(b), above quoted, forwarded the complete papers to the Adjutant General (R. 13A). Under the provisions of that regulation, Petitioner demanded the papers (R. 8A-10A), and was refused, no reason being given (R. 11A).

The suit in *mandamus* below followed. It was resisted by a Motion to Dismiss (R. 12A), supported by an affidavit admitting the existence and possession of reports of investigation of charges, and so forth, but stating that these papers contained information classified as Confidential, and that the public interest would be injuriously affected by their release to plaintiff (R. 12A-13A). The trial court thereupon, on March 17, 1950, dismissed the suit for *mandamus* (R. 14A).

Subsequently, the Army discovered it was entirely in error in taking action against Petitioner. Pursuant to a hearing before the Army Board on Correction of Military Records, the Secretary of the Army directed that:

> 1. Petitioner's records be corrected by notation thereon to show Petitioner honorably discharged, and that a new and honorable discharge be issued him (R. 29).
>
> 2. A similar correction be made to show a terminal promotion to Colonel from Lieutenant Colonel (R. 29-30).
>
> 3. A correction be made to show his Reserve Commission had been revoked through error, and that a new Reserve Commission be given him (R. 30).
>
> 4. That all personal letters be returned to him (R. 30).
>
> 5. That the Army take such action as necessary "to effectuate the foregoing corrections and the rights, entitlements, and benefits normally accruing therefrom" (R. 30).

Petitioner's application for restoration to active duty was denied (R. 30). He has not been vindicated by restoration to duty.

In June 1949, Petitioner filed suit for slander in the District Court against Dong Sung Kim, a Korean National. In the course of this lawsuit, he subpoenaed the records which are the subject of the present *mandamus* suit (R. 16).

Major Andrews appeared with the records, but refused to produce them for inspection. The Court denied a motion for their inspection (R. 18). Major Andrews testified about them only insofar as they were relevant to issues in the Kim case (R. 17-18).

His testimony was that the Adjutant General felt that any detailed information would be against the public interest, as involving national security (R. 17); this even though the information contained therein was only classified as confidential (R. 13A). (Material classified as confidential does not endanger national security. A.R. 380.05).[1]

Major Andrews admitted that the refusal to allow inspection of the file was not so much because of the national security as because "the disclosure of the information from this record would be prejudicial to the interests of the Army

---

[1] A.R. 380-5, promulgated on March 6, 1946, provides in pertinent part:

"7. Confidential matter. a. Documents, information, or material, the *unauthorized* disclosure of which, while *not* endangering national security, would be prejudicial to the interests or prestige of the nation, any governmental activity, an individual, or would cause administrative embarrassment or difficulty, or be of advantage to a foreign nation, shall be classified CONFIDENTIAL. (Italics supplied.)

b. The following are examples of matter which normally will be graded CONFIDENTIAL:

(1) Matters, investigations, and documents of a personal and disciplinary nature, the knowledge of which it is desirable to safeguard for administrative reasons.

"10. b. Confidential. Documents, development projects, material, or technical information may be classified as CONFIDENTIAL by *any* commissioned officer. (Italics supplied.)

"15. Responsibility. • • • Classified military information will be disclosed only to military or civilian personnel having a legitimate interest therein."

Paragraph 7 clearly indicates that even *unauthorized* disclosure of matter classified as CONFIDENTIAL does not endanger national security. Delivery of the papers petitioner is seeking here is not only authorized, but commanded, by A. R. 600-355; but it is also contemplated by paragraph 15 of A. R. 380-5, for who could have a more legitimate interest than the petitioner.

and to the individuals" (R. 17); and indicated that delivery of the papers to the petitioner would not involve national security in a direct attack on Army procedure (R. 17).

Testifying in a general way, he revealed that the investigation of Petitioner which resulted in his arrest, began with the receipt of an anonymous letter from a man called Maines, addressed to the Commanding General in Korea, to the effect that Petitioner had in his possession two handfuls of uncut diamonds (R. 17).

The Kim slander suit resulted in a finding by the Court for Petitioner for $10,000 (R. 18).

Basis of Decision Below Holding Case Moot

The Court below, in its opinion, stated:

> "In his motion to dismiss this appeal as moot, appellee . . . showed that, in a civil action for slander brought by appellant in the District Court in connection with these same matters, an official of the War Department took the witness stand and testified as to the contents of the papers here involved,[2] insofar as they did not involve matters affecting national security. Thus it appears that all substantive objectives which could be served by a writ of mandamus have been served. The action is therefore moot" (R. 19-20).

Question Presented

Whether, in a case where an officer in the Army had been arrested and confined without charges being preferred or a court-martial ordered, and an Army Regulation provides that under such circumstances a copy of all papers must be sent to the officer arrested or confined, the obligation upon the Army to deliver the papers in question to the officer is enforceable;

---

[2] The only papers testified to by the witness were *there* involved, *not here* involved, which latter the witness did not produce to the Court.

Whether, in the circumstances above described, the findings and decision of the Court of Appeals that the matter has become moot is supported by the record.

Reasons for the Allowance of the Writ

1. The Court should exercise its jurisdiction in this case in order that the constitutional doctrine of civilian control of the military may be preserved.

Article I, Section 8, of the Constitution places in Congress the power to make rules for the government and regulation of the land and naval forces. Refusal of the courts to enforce laws and regulations made pursuant to this constitutional power avoids this constitutional provision, deprives Congress of its control, and clothes the military with absolute power.

2. The Fifth Amendment to the Constitution is violated by the Army policy of disregard of Army law and regulations illustrated by this case. This Court has held that one in the military is not deprived of his constitutional right to due process by reason of military service, and that constitutional due process for one in the armed forces is prescribed by Army law and regulations. *Reaves* v. *Ainsworth,* 219 U. S. 296, 304; *U. S.* v. *Eliason,* 16 Peters 291; *Gratiot* v. *United States,* 4 Howard 80. There are now 3½ million men in the armed forces. In *Wales* v. *Whitney,* 114 U. S. 564, 571, this Court recognized that service in the armed forces is accompanied by loss of liberty, "by the very necessity of military rule and subordination." The *forfeiture* of rights *not* required by the nature of military service can be avoided only by judicial enforcement of law and regulation imposed by civilian authority.

3. The fairness and integrity of Army discipline depend upon enforcement of AR 600-355(6)(b), which places a

brake upon the abuses forbidden by Article of War 70.[3] It is only by putting the record into the hands of the accused that violations of A.W. 70 come to light.[4] In *Humphrey* v. *Smith,* 336 U. S. 695, Justices Murphy, Douglas, and Rutledge pointed out, in a dissent, that, unless the civilian courts enforced A.W. 70, it would never be enforced. The present case gives this Court the opportunity to affirm the necessity of observance of A.W. 70, without weakening the general rules as to what jurisdictional defects are reviewable on *habeas corpus,* as established by the opinion of the majority.

4. To deny relief in the nature of mandamus in the instant case is contrary to prior decisions of this Court. In this case, as in *Miguel* v. *McCarl,* 291 U. S. 442, and cases cited therein, the duty to deliver the papers to Petitioner is "so far ministerial that its performance may be compelled by mandamus."

Argument

Alleged Mootness Below:

The testimony, in general terms, of Major Andrews in the slander case did not make the present case moot in the true sense that the controversy between the parties had come to an end. (*Altvater* v. *Freeman,* 319 U.S. 359, 364; *U. S.* v. *Alaska S.S. Company,* 253 U.S. 113, 116). Indeed, it only accentuated the controversy by admitting possession of the papers but refusing to produce them for examination. There is no basis in the record for the holding of the Court below that "all substantive objectives which could be served by a writ of mandamus have been served" (R. 19-20).[5]

---

[3] Article of War 70 (41 Stat. 759, 802, as amended 10 U.S.C. Sec. 1542) requires a fair and thorough investigation, with notice to the accused, prior to reference of charges for trial.

[4] That article contains a penal provision which punishes unnecessary delay. (10 U.S.C. Sec. 1542)

[5] If this were so, the Petitioner would have dropped the matter.

The need of petitioner to have copies of the records to which he is entitled by A.R. 600-355(6)(b) is even greater than usual when an officer has been placed in arrest or confinement without charges being preferred, and court-martial deemed inadvisable; for, in the usual case, the officer is returned to duty when the decision not to try him is made. In the instant case, although some corrective action has been taken, petitioner has not been restored to active duty.

The meager and sketchy data supplied by Major Andrews (R. 17-18) could not possibly reflect the contents of reports which were relied on to relieve Petitioner from duty, imprison him for over three months, discharge him without honor, vacate his Reserve Commission, and other drastic action.

The regulation does not require Petitioner to show what substantive objectives may be served by delivery of the papers to him; and, indeed, to so require is to render the provision meaningless, for, until there has been delivery, an officer who has been arrested and confined without charges being preferred cannot know what the papers will show. The regulation is mandatory that the papers be given the accused in every case which does not result in court-martial.

In the instant case, the limited testimony of a representative of the Adjutant General, in a private litigation, disclosed a violation of one legal right for which Petitioner could recover in a civil action. Petitioner can only speculate as to the number, nature, and extent of other violations presently concealed in the papers he seeks to obtain. It is apparent, from the fact that the regulation does not apply to court-martial cases, that one of the principal purposes to be served by the regulation is to make available to the accused information he would otherwise have obtained in a court-martial proceeding, as to the identity of his accusers and

the nature of the accusations against him, and to give him the right to defend himself against the accusations.[6]

The refusal of the military command to deliver the papers in this case to Petitioner, in compliance with A. R. 600-355 (6) (b) compels one of two inferences. Either the files disclose specific acts of misconduct on the part of military authorities, or the command is pursuing a policy of defiance of civilian restraints. These inferences are strengthened by the fact that the refusal continues even after a determination by a civilian board (the Army Board for the Correction of Military Records) that the disciplinary action taken against Petitioner was "in error and unjust."

Such continuing defiance by military command of law and regulations promulgated by civilian authority can only be prevented by judicial control. The fairness and integrity of discipline is dependent upon enforcement of such restraints upon military authority. Congress, by the various Army Reorganization Acts (Titles 10 and 50 U.S.C.) and, in particular, by the Military Justice Acts of 1948 and 1950 (62 Stat. 639; 64 Stat. 107) and the Acts for the Correction of Military Records (60 Stat. 812; Public Law 220, 82nd Congress, approved October 25, 1951), has shown its extreme interest in protecting the rights of servicemen.

If the courts refuse to enforce rules for government of the armed forces imposed by the Congress and other proper civilian authority, then the traditional American concept of civilian control of the armed forces is destroyed, with the consequent deprivation of individual rights in violation of the Constitution and to the detriment of the national security.

---

[6] As said in *Humphrey* v. *Smith*, 336 U.S. 695, 701 (diss.), the officer's record "is forever besmirched by the words 'general court-martial.'" A notation *not* to court-martial the officer is, unexplained, equally as bad, as the present case illustrates.

Conclusion

The petition should be granted.

Respectfully submitted,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
CLARA L. LONGSTRETH,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Regulations involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Barker Co. v. *Painters Union*, 281 U.S. 462	9
Denby v. *Berry*, 263 U.S. 29	10
Hammond v. *Hull, et al.*, 131 F. 2d 23, certiorari denied, 318 U.S. 777	10
Keim v. *United States*, 177 U.S. 290	10
Lake Charles Metal Tr. Council v. *Newport Industries*, 181 F. 2d 820	9
Lewis Publishing Co. v. *Wyman*, 228 U.S. 610	9
Mills v. *Green*, 159 U.S. 651	9
United States ex rel. Girard Trust Co. v. *Helvering*, 301 U.S. 540	10
United States ex rel. Roughton v. *Ickes*, 101 F. 2d 248	10
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206	10
Woods v. *Malcolm-Dallyn Co.*, 177 F. 2d 414	9

Constitution and Regulations:

Constitution of the United States:	
Fifth Amendment	10
Army Regulation 600-355, issued July 17, 1942:	
Paragraph 6(b)	2, 6
Army Regulation 380-5, issued March 6, 1946:	
Paragraph 4	3
Paragraph 12	3
Paragraph 15	3

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 25(d)	8

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 701

CHARLES GORDON, PETITIONER

v.

WILLIAM E. BERGIN, INDIVIDUALLY AND AS ADJUTANT GENERAL OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia (R. 14) is not reported. The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit (R. 19-20) is reported at 193 F. 2d 367.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1951 (R. 21). On February

12, 1952, Chief Justice Vinson extended the time for filing a petition for certiorari to March 12, 1952 (R. 34). On March 10, 1952, Mr. Justice Black further extended the time for filing to April 11, 1952 (R. 35). The petition was filed on April 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly found that an action for a writ of mandamus was moot because all substantive objectives of the writ had been fulfilled.

REGULATIONS INVOLVED

1. Army Regulation 600-355 (Personnel, Arrest and Confinement), issued July 17, 1942, provided in pertinent part:

> 6. *Statements and reports.*
>
> * * * * *
>
> b. *By the commanding officer.* Whenever a commanding officer places an officer in arrest or confinement without preferring charges, he will make a written report of his action to the officer having general court-martial jurisdiction, who will call on the officer arrested or confined for any explantion he may desire to make and take such further action within his authority as he may think necessary. When trial is deemed inadvisable, the officer having general court-martial jurisdiction will forward all papers in the case to the Adjutant

General, through military channels, with a statement of action taken and reasons therefor. A copy of all papers will at the same time be sent to the officer arrested or confined, who may address to the Adjutant General direct any further statement or explanation he may desire to make. When no further action is contemplated by the War Department, the papers in the case or copies thereof will be filed with the officer's record and the officer so advised through military channels.

2. Army Regulation 380-5 (Military Security, Safeguarding Military Information), issued March 6, 1946, provided in pertinent part:

4. Categories. Official matter requiring classification shall be examined, graded, and marked top secret, secret, confidential, or restricted. Top secret is a special grading given to certain secret matter.

* * * * *

12. Dissemination of classified matter. No person is entitled solely by virtue of his grade or position to knowledge or possession of classified matter. Such matter is entrusted only to those individuals whose official duties require such knowledge or possession.

* * * * *

15. Responsibility. The safeguarding of classified military information is the responsibility of all military personnel, civilian employees of the War Department, and of the

management and employees of all commercial firms engaged in classified work or projects for the War Department. Classified military information will be disclosed only to military or civilian personnel having a legitimate interest therein.

* * * * *

STATEMENT

From September, 1945, to March, 1947, petitioner, a Lieutenant Colonel in the Army, was assigned to duty with the United States Military Government in Korea (R. 3). On April 18, 1947, after his return to the United States, he was arrested in the Pentagon and kept in confinement until July 25, 1947 (R. 3). On that date, and after the Commanding General of the Military District of Washington had decided not to bring petitioner to trial on charges made against him, petitioner was discharged from the Army under conditions other than honorable (R. 4, 9). Two weeks later, his Officer's Reserve Corps commission was rescinded (R. 4).

The following month, September, 1947, petitioner learned that various investigations had been made concerning his sending from Korea into the United States "twelve large wooden boxes in violation of the Customs laws", that full reports of these investigations had been forwarded to the Commanding General of the Military District of Washington, and that on the basis of these reports

the Commanding General had decided not to bring petitioner to trial but to separate him from the service (R. 4, 9).

On June 30, 1949, petitioner instituted a civil action for slander against Dong Sung Kim in the United States District Court for the District of Columbia, alleging that Kim had made slanderous statements concerning petitioner's activities in Korea (R. 24). Since the information in the above-described reports submitted to the Commanding General was deemed of value to petitioner in prosecuting his slander action, a subpoena was issued directing the Adjutant General of the Army, or his agent, to produce the "official records and reports of investigations and complaints" leading to petitioner's arrest, confinement and discharge from the Army (R. 24-25). Major Andrews appeared in response to the subpoena, brought with him the requested records and reports, and while testifying as to their contents insofar as they were relevant to the issues in the *Kim* case, refused to allow petitioner or his attorneys to inspect the papers (R. 17, 18, 25).[1] Major Andrews' refusal was based on reasons of "national security" and on the ground that the great majority of the file was "classified" and that disclosure "would be prejudicial to the interests of the Army, and to the individuals" (R. 16-17).

---

[1] The Kim slander suit resulted in a finding by the District Court for petitioner for $10,000 (R. 18).

Because of this refusal, a motion for an order to compel the Adjutant General to allow inspection of the official Army records was made in the slander suit, but denied by the District Court on September 7, 1949 (R. 25). The affidavit of petitioner's attorney shows that "it was for this reason" that on October 24, 1949, more than two years after petitioner's discharge, that a letter was sent to the Army, requesting compliance with Army Regulation 600-355, par. 6(b) *supra,* pp. 2-3 (R. 26).

This letter referred to petitioner's arrest and the Commanding General's determination that trial was inadvisable (R. 8-9). Relying on the Army Regulation, the letter requested a copy of all the papers and reports made available to the Commanding General concerning the arrest (R. 10). This request was denied by the Army on November 14, 1949 (R. 11).

Petitioner then brought the instant suit in the United States District Court for the District of Columbia, against the Secretary of the Army and the Army Adjutant General, seeking a writ of mandamus to compel those officials to comply with Army Regulation 600-355 by furnishing copies of the requested papers (R. 2-7). The complaint made no mention of the slander action or petitioner's desire to obtain the papers for his use in that action. Instead, the complaint alleged that the papers were necessary to enable petitioner "to adequately prepare a petition for the correction

of the nature of his unsatisfactory discharge from the Army without honor" (R. 7).

The Government moved to dismiss the complaint for failure to state a cause of action (R. 12). In support of the motion, a Government affidavit showed that virtually all of the papers requested were classified as "Confidential," that they contained information which was diplomatic in character and that the release of such information to petitioner was prohibited by Army Regulation 380-5 (Military Security, Safeguarding Military Information), *supra*, pp. 3-4 (R. 13). The District Court granted the Government's motion and dismissed the complaint on March 17, 1950 (R. 14).

While petitioner's appeal from this dismissal was pending in the court below, the Secretary of the Army, on application made by petitioner, approved the recommendations of an Army Board of Correction of Military Records and directed *inter alia* that:

> 1. Petitioner's Army records be corrected to show petitioner honorably discharged, and that a new and honorable discharge be issued him (R. 29).
>
> 2. A similar correction be made to show a terminal promotion to Colonel from Lieutenant Colonel (R. 29-30).
>
> 3. A correction be made to show his Reserve Commission had been revoked through error, and that a new Reserve Commission be given him (R. 30).

This action taken by the Secretary was brought to the attention of the court below (R. 29). In its opinion, that court noted that petitioner's Army records had been corrected to show an honorable separation from duty (R. 19). The opinion also pointed out that in the civil action for slander an official of the War Department had taken the witness stand and "testified as to the contents of the papers here involved, in so far as they did not involve matters affecting national security" (R. 20). Since it therefore appeared that "all substantive objectives which could be served by a writ of mandamus have been served", the court below dismissed the appeal as moot (R. 20, 21).[2]

ARGUMENT

The only question presented by this case is whether the facts before the court below were sufficient to support the court's holding that all of the substantive objectives of the requested writ of mandamus had been fulfilled and that the controversy had therefore come to an end and was moot. Since no conflict of decisions is even asserted and the issue is essentially a factual one, we submit that review here is not warranted.

---

[2] The court also dismissed the action as to former Army Secretary Gray, who had been succeeded by Secretary Pace without any substitution being effected within the permissible six-month period. Rule 25(d), Fed. R. Civ. Procedure (R. 20). Although former Adjutant General Witsell, who also had been joined as a defendant, later resigned, his successor, William E. Bergin, the respondent here, was properly substituted (R. 20).

It cannot be denied that a federal appellate court will not do the vain thing of making a decision on questions which have become academic or moot. *Barker Co.* v. *Painters Union,* 281 U.S. 462; *Mills* v. *Green,* 159 U.S. 651. This is especially true in suits for injunctive or mandatory relief where an injunction if granted "would be ineffectual and any decision [which might be made] would not decide any actual controversies because such controversies have ceased to exist." *Woods* v. *Malcolm-Dallyn Co.,* 177 F. 2d 414, 416 (C.A. 8); *Lake Charles Metal Tr. Council* v. *Newport Industries,* 181 F. 2d 820 (C.A. 5); see *Lewis Publishing Co.* v. *Wyman,* 228 U.S. 610, 615.

Petitioner does not challenge these settled principles but endeavors to avoid their impact by alleging that the purposes which could have been served by a writ of mandamus have not been fulfilled. The record before the court below, however, disproves that claim. The record shows that the writ was desired to obtain information to be used for two purposes: (1) to prepare a petition to the Army for the correction of his unsatisfactory discharge and (2) to obtain testimony for use in his slander suit against Kim (R. 7, 25). Both of these objectives, as the above Statement shows (*supra,* pp. 5-7), were realized before the court below properly dismissed the appeal.

Nor is petitioner's argument that he has not been restored to active duty a sufficient basis to

support the appeal. The short answer to petitioner's contention is that he did not seek restoration to active duty in the complaint filed for a writ of mandamus (R. 2-7). In any event, there is no doubt that if such relief had been sought it could not have been granted in a mandamus action. The rule is a firmly established that a decision of an administrative officer involving the exercise of discretion and judgment cannot be set aside by process in the nature of mandamus. *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206; *Denby* v. *Berry,* 263 U.S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540; *Keim* v. *United States,* 177 U.S. 290, 292; *Hammond* v. *Hull, et al.,* 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U.S. 777; *United States ex rel. Roughton* v. *Ickes,* 101 F. 2d 248 (C. A. D. C.). That the determination of Army officials as to the eligibility of an officer for restoration to duty calls for the exercise of such discretion and judgment is not open to serious question.[3]

[3] Since the sole issue here is whether the court below properly dismissed the case as moot, petitioner's argument that his 5th Amendment rights were somehow violated is not in point (Pet. 7).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

MAY, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 207801 1229